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No. 94-

In the Supreme Court of the United States

OCTOBER TERM, 1994

DISTRICT OF COLUMBIA, *et al.*,
Petitioners,

v.

BRENDA LAMPKIN, AS LEGAL GUARDIAN OF JESSICA LAMPKIN AND CHRISTINE LAMPKIN, MINORS, *et al.*,
Respondents.

Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 21, 1993 Decided July 1, 1994

No. 92-7143

BRENDA LAMPKIN, AS LEGAL GUARDIAN OF JESSICA LAMPKIN AND CHRISTINE LAMPKIN, MINORS, ET AL., APPELLANTS

v.

DISTRICT OF COLUMBIA, A MUNICIPAL CORPORATION, ET AL., APPELLEES

Appeal from the United States District Court for the District of Columbia (D.D.C. No. 92cv00910)

Kerrie C. Dent argued the cause for appellants. With him on the briefs were *James D. Miller*, *Maria Foscarinis*, and *Arthur B. Spitzer*.

Donna M. Murasky, Assistant Corporation Counsel for the District of Columbia, argued the cause for appellees. With her on the brief were *John Payton*, Corporation Counsel,

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Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Charles L. Reischel, Deputy Corporation Counsel, and *Lutz Alexander Prager*, Assistant Deputy Corporation Counsel.

Deborah E. Greenspan and *Gary Thompson* were on the brief for *amici curiae* U.S. Representatives Thomas Foglietta, George Miller, Tom Lantos, Louise Slaughter, and Jolene Unsoeld.

Before EDWARDS, BUCKLEY, and SENTELLE, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* BUCKLEY.

Dissenting opinion filed by *Circuit Judge* SENTELLE.

BUCKLEY, *Circuit Judge*: Parents of homeless children residing in the District of Columbia seek to invoke 42 U.S.C. § 1983 to enforce provisions of the Stewart B. McKinney Homeless Assistance Act. Concluding that the McKinney Act does not confer enforceable educational rights on homeless children, the district court granted the District of Columbia's motion to dismiss. Because we disagree with the district court's interpretation of the governing Supreme Court case law, we reverse and remand for further proceedings.

I. INTRODUCTION

The McKinney Act, Pub. L. No. 100–77, 101 Stat. 482 (codified as amended at 42 U.S.C.A. §§ 11301 *et seq.* (West Supp. 1993)), was passed in 1987 in response to "the critically urgent needs of the homeless," 42 U.S.C. § 11301(b)(2) (1988), including the proper education of their children. 42 U.S.C. §§ 11431–35 (Supp. IV 1992). The Act is a mix of large visions and gritty detail, combining specific sections dealing with the provision of education to homeless children and youths with a broad congressional policy that "each State educational agency ... assure that each child of a homeless individual and each homeless youth have access to a free, appropriate public education ... [and that] homelessness alone ... not be sufficient reason to separate students from the mainstream school environment." *Id.* § 11431.

To achieve this goal, the Secretary of Education is empowered to grant funds to States participating in the programs

authorized by the McKinney Act. 42 U.S.C. § 11432(a) (1988). Grants may be used, among other purposes, to "establish or designate an Office of Coordinator of Education of Homeless Children and Youth" and to "prepare and carry out the State plan described in subsection (e) of this section." 42 U.S.C. § 11432(c)(3) & (4) (Supp. IV 1992). Subsection (d) defines the functions of the Coordinator, which include the duty to "develop and carry out the State plan" and to "facilitate coordination" between state agencies and others providing assistance to homeless children and their families. *Id.* § 11432(d)(2) & (4).

Subsection (e), which is captioned "State plan," consists of nine paragraphs that may be divided into three parts. The first consists of paragraph (1) and its nine subparagraphs. These describe in general terms the concerns that are to be addressed by the plan: e.g., establishment of procedures for the resolution of disputes regarding the educational placement of homeless children and youths, assurance of their ability to participate in food programs, and undertaking to protect them from being isolated or stigmatized. *Id.* § 11432(e)(1)(A)-(I). The second part, paragraph (2), requires that the state plan assure, to the extent feasible under state law, "that local educational agencies within the State will comply with the requirements of paragraphs (3) through (9)." *Id.* § 11432(e)(2).

Paragraphs (3) through (9), which comprise the third part of subsection (e), are devoted to the "gritty details"—the specific means by which the educational, health, and other needs of the Act's beneficiaries will be addressed. To cite three examples that are germane here, paragraphs (3), (5), and (7) read in relevant part as follows:

> (3)(A) The local educational agency of each homeless child and each homeless youth shall either—
>
> (i) continue the child's or youth's education in the school of origin—
>
> (I) for the remainder of the academic year; or

(II) in any case in which a family becomes homeless between academic years, for the following academic year; or

(ii) enroll the child or youth in any school that nonhomeless students who live in the attendance area in which the child or youth is actually living are eligible to attend;

whichever is in the child's best interest or the youth's best interest.

(B) In determining the best interests of the child or youth for purposes of making a school assignment under subparagraph (A), consideration shall be given to a request made by a parent regarding school selection.

. . .

(5) Each homeless child shall be provided services comparable to services offered to other students in the school selected according to the provisions of paragraph (3), including transportation services . . .; and school meals programs.

. . .

(7) Each local educational agency serving homeless children or youth that receives assistance under this subchapter shall coordinate with local social services agencies, and other agencies or programs providing services to such children or youth and their families.

Id. § 11432(e)(3), (5) & (7).

Appellants here are homeless children living in the District of Columbia, which is deemed a State for purposes of the McKinney Act. 42 U.S.C. § 11421(d) (1988). They filed this action in the district court pursuant to 42 U.S.C. § 1983 (1988), which provides a cause of action against persons who infringe upon federal constitutional or statutory rights while acting "under color" of state law. Appellants allege that the District has violated section 11432(e)(3), (5), (7), (8) and (9), as

well as sections 11431(1), (2) and 11432(c)(2), (4). They seek an order requiring, among other things, that the District consider parents' requests and make "best interests" determinations when placing homeless children in schools; that it assure homeless children the transportation necessary to attend those schools; and that it ensure them access to various educational and school meal programs, and other services.

The district court found that the McKinney Act did not create an enforceable right of action under section 1983 and dismissed the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted. *Lampkin v. District of Columbia*, Civ. No. 92–0910, slip op. at 14–15 (D.D.C. June 9, 1992). Thus the sole question before us on appeal is whether the homeless children can enforce the relevant provisions of the McKinney Act pursuant to section 1983, a question we answer in the affirmative.

II. Discussion

Since 1980, the Supreme Court has recognized that section 1983 may be invoked to challenge violations of federal statutes. *Maine v. Thiboutot*, 448 U.S. 1, 6–8 (1980). This rule has its exceptions: A statute will not be deemed enforceable under section 1983 if Congress did not intend to create any enforceable rights in it (which may be evidenced by the provision of a comprehensive remedial scheme in the statute itself) and where the statute "did not create enforceable rights, privileges, or immunities within the meaning of § 1983." *Wright v. Roanoke Redev. and Hous. Auth.*, 479 U.S. 418, 423 (1987). These exceptions are more easily stated than applied, as will be apparent from the Supreme Court's recent decisions in *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990), and *Suter v. Artist M.*, 112 S. Ct. 1360 (1992).

A. *Wilder v. Virginia Hospital Association*

In *Wilder*, the plaintiffs challenged the method by which the State of Virginia reimbursed health care providers under

the Medicaid Act, 42 U.S.C. § 1396 *et seq.* (1988). In particular, the Court faced the question

> whether the Boren Amendment to the Act, which requires reimbursement according to rates that a "State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities," is enforceable in an action pursuant to § 1983.

Wilder, 496 U.S. at 501–02 (quoting 42 U.S.C. § 1396a(a)(13)(A)).

Drawing on its decision in *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103 (1989), the Court established a test to determine whether a statutory provision creates a federal right enforceable under section 1983. First, the provision must have been intended to benefit the putative plaintiff. *Wilder*, 496 U.S. at 509. If it was so intended,

> the provision creates an enforceable right unless it [1] reflects merely a congressional preference for a certain kind of conduct rather than a binding obligation on the governmental unit ... or [2] unless the interest the plaintiff asserts is too vague and amorphous such that it is beyond the competence of the judiciary to enforce.

Id. (internal quotation marks and citations omitted). Once it has been determined that an enforceable right exists, the statute must be examined to determine whether "Congress has foreclosed such enforcement of the statute in the enactment itself." *Wright*, 479 U.S. at 423. In applying this test to the Boren Amendment, the Court stated that there was little doubt that health care providers were its intended beneficiaries. *Wilder*, 496 U.S. at 510. The Court then reasoned that as the amendment was "cast in mandatory rather than precatory terms," it "imposes a binding obligation on States participating in the Medicaid program to adopt reasonable and adequate rates and ... is enforceable under § 1983 by health care providers." *Id.* at 512.

This interpretation, which gives substantive teeth to the reimbursement provision contained in the Medicaid Act, was criticized by the dissenting justices. *See id.*, 496 U.S. at 524 (Rehnquist, C.J., dissenting, joined by O'Connor, Scalia, and Kennedy, JJ.). The dissenters agreed that a signatory State was obligated to follow a particular process in providing *some* level of reimbursement to health care providers but concluded that the exact level of reimbursement was left to the discretion of the States. *Id.* at 527–28. The majority disagreed, holding that "the only plausible interpretation of the amendment is that by requiring a State to *find* that its rates are reasonable and adequate, the statute imposes the concomitant obligation to adopt reasonable and adequate rates." *Id.* at 514–15 (emphasis in original). The majority also rejected the argument that the obligation imposed by the amendment was too "vague and amorphous" to be judicially enforceable. *Id.* at 519. Citing the guidance set forth in the statute and accompanying regulations, including "the objective benchmark of an 'efficiently and economically operated facility' providing care in compliance with federal and state standards while at the same time ensuring 'reasonable access' to eligible participants," the majority concluded that while the statute grants the States "substantial discretion," it does not foreclose judicial review. *Id.*

Turning to the second prong of the inquiry, the majority concluded that Congress had not foreclosed enforcement of the Medicaid Act under section 1983. It found that "the Act [did] not expressly preclude resort to § 1983"; nor did it "create[ ] a remedial scheme that is 'sufficiently comprehensive ... to demonstrate congressional intent to preclude the remedy of suits under § 1983.' " *Id.* at 521 (quoting *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981)). In the eyes of the Court, the Act's grant of authority to the Secretary of Health and Human Services "to withhold approval of plans" or "to curtail federal funds to States whose plans are not in compliance with the Act" was not "sufficiently comprehensive to demonstrate a congressional intent to withdraw the private remedy of § 1983." *Id.* at 521–22.

B. *Suter v. Artist M.*

Two years later, the Court again addressed the availability of the section 1983 remedy. In *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), the Court was called upon to determine whether a provision of the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 620–28, 670–79a (1988), could be enforced under section 1983. Under the Child Welfare Act, States seeking federal reimbursement of "a percentage of foster care and adoption assistance payments" "must submit a plan to the Secretary of Health and Human Services for approval." *Suter*, 112 S. Ct. at 1363. To be approved, a plan must meet sixteen requirements, the following among them:

> [I]n each case, *reasonable efforts* will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home....

Id. at 1364 (quoting 42 U.S.C. § 671(a)(15) (emphasis added)). In *Suter*, the plaintiffs sought to use section 1983 as the procedural vehicle to obtain substantive enforcement of this "reasonable efforts" provision.

In examining the nature of the obligations created by the Child Welfare Act, the Court observed that

> [t]he legitimacy of Congress' power to legislate under the spending power ... rests on whether the State voluntarily and knowingly accepts the terms of the "contract." ... [I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.

Id. at 1366 (quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981)). Thus the critical inquiry in *Suter* was whether, "in light of the entire legislative enactment," the Child Welfare Act "unambiguously confer[red] upon [its] beneficiaries ... a right to enforce the requirement that the State make 'reasonable efforts' to prevent a child from being removed from his home, and once removed to reunify the child with his family." *Id.* at 1367.

The Court began its inquiry with the statutory language—"reasonable efforts will be made"—and noted that it was

"mandatory in its terms." *Id.* at 1367. Nonetheless, the Court's central focus was on what action was required of a State in exchange for the grant of federal funds:

> Here, the terms of § 671(a) are clear: "In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary." Therefore the [Child Welfare] Act does place a requirement on the States, but that requirement only goes so far as to ensure that the State have a plan approved by the Secretary which contains the 16 listed features.

Id. (footnote omitted). Because the State's sole obligation was to submit a plan for the Secretary's approval, the Court concluded that section 1983 could not be invoked.

In so holding, the Court emphasized that each statute is to be interpreted on its own terms. *Id.* at 1367 n.8 ("our holding today ... merely counsels that each statute must be interpreted by its own terms."). The Court distinguished *Wilder* on the grounds that

> in that case we held that the Boren Amendment actually required the States to adopt reasonable and adequate rates, and that this obligation was enforceable by the [health care] providers. We relied in part on the fact that the statute and regulations set forth in some detail the factors to be considered in determining the methods for calculating rates.

Id. at 1368. The Court then contrasted the Child Welfare Act, where "[n]o further statutory guidance is found as to how 'reasonable efforts' are to be measured." *Id.* Similarly, no regulatory provision evidenced "any requirement for state receipt of federal funds other than the requirement that the State submit a plan to be approved by the Secretary." *Id.* at 1369 (footnote omitted). The Court thus concluded that the directive to use reasonable efforts was so open-ended, and the resulting state discretion so broad, that judicial enforcement was an impossibility.

In foreclosing private enforcement of the Child Welfare Act's "reasonable efforts" clause, the Court noted that the Act

contained alternative mechanisms for its enforcement. These included the provisions, in subsection 671(b), that allowed the Secretary

> to reduce or eliminate payments to a State on finding that the State's plan no longer complies with § 671(a) or that "there is a substantial failure" in the administration of a plan such that the State is not complying with its own plan.

Id. at 1368. The Court also referred to a provision conditioning federal reimbursement of foster care payments made with respect to a child involuntarily removed from his home on " 'a judicial determination to the effect that continuation [in the child's home] would be contrary to the welfare of such child.' " *Id.* (quoting 42 U.S.C. § 672(a)(1)). The Court concluded from these provisions that "the absence of a remedy to private plaintiffs under § 1983 does not make the reasonable efforts clause a dead letter." *Id.* at 1369 (footnote omitted).

C. Private Enforcement of the McKinney Act

In applying this jurisprudence to the McKinney Act, the first question to ask is whether the statute was intended to benefit persons such as appellants' children. *See Wilder,* 496 U.S. at 509; *Suter,* 112 S. Ct. at 1367. This point is not in dispute here: The parties all agree that the McKinney Act was enacted to benefit homeless children. *See* 42 U.S.C. § 11431. That said, we must hold that the Act "creates an enforceable right *unless* it reflects merely a congressional preference for a certain kind of conduct rather than a binding obligation on the governmental unit." *Wilder,* 496 U.S. at 509 (citation and internal quotation marks omitted; emphasis added). Mindful of the need "to analyze the statutory provisions in detail, in light of the entire legislative enactment, to determine whether the language in question create[s] enforceable rights, privileges, or immunities within the meaning of § 1983," *Suter,* 112 S. Ct. at 1367 (internal quotation marks omitted), we must determine whether the Act creates rights that are substantively enforceable under section 1983.

Section 11432(f) of the McKinney Act provides:

> No State may receive a grant under this section unless the state educational agency submits an application to the Secretary at such time, in such manner, and containing or accompanied by such information as the Secretary may reasonably require.

42 U.S.C. § 11432(f) (1988). The regulations issued by the Secretary stipulate that a State may not begin to obligate funds received pursuant to a federal grant until the later of the two following dates: "[t]he date that the State plan is mailed or hand delivered to the Secretary in substantially approvable form" and "[t]he date that the funds are first available for obligation by the Secretary." 34 C.F.R. § 76.703(a)(1) & (2). The regulations further stipulate that a State

> shall comply with the State plan and applicable statutes, regulations, and approved applications, and shall use Federal funds in accordance with those statutes, regulations, plan, and applications.

Id. at § 76.700. Here, of course, the "applicable statute[ ]" is the McKinney Act, and the obligations it imposes on participating States are clear. The Act requires that grants provided by the Secretary be used, *inter alia*, "to prepare and carry out the State plan," 42 U.S.C. § 11432(c)(4), and that "[e]ach plan ... assure ... that local educational agencies within the State will comply with the requirements of paragraphs (3) through (9)," *id.* at § 11432(e)(2). Paragraphs (3) through (9) in turn provide highly specific instructions for meeting a variety of needs of homeless children and youths. This structure markedly contrasts with that of the Child Welfare Act, with which the *Suter* Court was concerned. Although both Acts describe in detail the contents of the plan a participating State must adopt, only the McKinney Act provides specific directions for the plan's execution. *Compare* 42 U.S.C. § 671(a) *with* 42 U.S.C. § 11432(e). It is this distinction that is ignored by our dissenting colleague, who concludes that "the genuine statutory duty of a recipient state under the McKinney Act is to prepare and carry out a plan, *designed to* achieve nine designated goals." Dissent at 2 (internal quotation marks omitted, emphasis in original).

While we agree that the McKinney Act requires the State to submit such a plan, it also differs significantly from the Adoption Act in that paragraphs (3) through (9) of subsection 11432(e) of the McKinney Act not only inform the State in great detail on how its plan is to be implemented, they impose obligations that are independent of the plan. These are set forth in specific, mandatory terms; and it is these that appellants seek to enforce. Thus, paragraph (3) requires that

> [t]he local educational agency of each homeless child and each homeless youth *shall* [assign the child or youth to a school which] is in the child's best interest or the youth's best interest.... In determining the best interests of the child or youth ... consideration *shall* be given to a request made by a parent regarding school selection.

Id. § 11432(e)(3) (emphasis added). Succeeding paragraphs stipulate that "[e]ach homeless child *shall* be provided services comparable to services offered to other students in the school ...," *id.* § 11432(e)(5) (emphasis added), and that records ordinarily kept by the school "*shall* be maintained" so as to be available when the child enters a new school district. *Id.* § 11432(e)(6) (emphasis added). Furthermore, they provide that

> [e]ach local educational agency serving homeless children or youth that receives assistance under this subchapter *shall* coordinate with local social services agencies, and other agencies or programs providing services to such children or youth and their families[,]

id. § 11432(e)(7) (emphasis added), and "*shall* designate a homelessness liaison." *Id.* § 11432(e)(8) (emphasis added). We read this language as "mandatory rather than hortatory." This interpretation is supported by paragraph (2), which describes paragraphs (3) through (9) as "requirements" rather than options. *Id.* § 11432(e)(2).

In addition to the mandatory obligations listed in those seven paragraphs, the McKinney Act also provides that

> [t]he Coordinator of Education of Homeless Children and Youth established in each State *shall* ... once every 2 years, gather data on the number and location of home-

> less children and youth in the State ... develop and carry out the State plan ... [and] facilitate coordination between the State education agency, the State social services agency, and other agencies providing services to homeless children and youth and their families.

Id. § 11432(d). The language of these provisions is sufficiently clear to put the States on notice of the obligations they assume when they choose to accept grants made under the Act. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981) ("if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously" (footnote omitted)).

Moreover, as we noted earlier, the Secretary has promulgated regulations stipulating that for state-administered programs like the McKinney Act, "[a] State ... shall comply with the State plan and applicable statutes, regulations, and approved applications, and shall use Federal funds in accordance with those statutes, regulations, plan, and applications." 34 C.F.R. § 76.700. *Contrast Suter*, 112 S. Ct. at 1369 (noting that the regulations accompanying the Child Welfare Act "do not evidence a view that [the statute] places any requirement for state receipt of federal funds other than the requirement that the State submit a plan to be approved by the Secretary" (footnote omitted)). Here, the regulations merely reinforce our conclusion that States undertake well-defined obligations when they elect to accept funds under the McKinney Act.

Finally, the McKinney Act contains no statutory mechanisms for the administrative enforcement of the beneficiaries' rights, suggesting that Congress did not intend to create a private cause of action that is enforceable under section 1983. *See Suter*, 112 S. Ct. at 1368–69 (citing alternative enforcement mechanisms provided by sections 671(b) and 672(a)(1) of the Child Welfare Act as showing that "the absence of a remedy to private plaintiffs under § 1983 does not make the reasonable efforts clause a dead letter" (footnote omitted)). Thus there is nothing in the structure of the McKinney Act to suggest that its beneficiaries may not invoke section 1983 to enforce their rights under the Act.

One hurdle remains before we can declare that the rights conferred on homeless children by the Act are enforceable in federal court. Even if a statute confers rights on a beneficiary, their judicial enforcement requires that they not be overly "vague and amorphous." *Wilder*, 496 U.S. at 519 (internal quotation marks omitted). The District argues that the statutory requirement that a school be selected in accordance with the "best interests" of a homeless child is at least as vague as the "reasonable efforts" clause that the Court found too amorphous in *Suter*. *See New York v. United States*, 112 S. Ct. 2408, 2445 (1992) (Justice White, concurring in part, dissenting in part, describing *Suter* as "not permitting a § 1983 suit under a Spending Clause statute when the ostensible federal right created was too vague and amorphous").

This argument asserts, in essence, that the judiciary is incapable of determining the "best interests" of children, just as the plaintiffs in *Wilder* argued that the judiciary was incapable of determining what constitutes "reasonable and adequate" hospital rates. *See Wilder*, 496 U.S. at 519. In response, the Court observed:

> That the [Boren] [A]mendment gives the States substantial discretion in choosing among reasonable methods of calculating rates may affect the standard under which a court reviews whether the rates comply with the amendment, but it does not render the amendment unenforceable by a court. While there may be a range of reasonable rates, there certainly are *some* rates outside that range that no State could ever find to be reasonable and adequate under the Act. Although some knowledge of the hospital industry might be required to evaluate a State's findings with respect to the reasonableness of its rates, such an inquiry is well within the competence of the Judiciary.

Id. at 519–20 (footnote omitted) (emphasis in original).

The obligations imposed by the McKinney Act involve, for the most part, the exercise of judgment by a local educational agency. A court, however, may discern whether the criteria

or procedures adopted by the agency are reasonably designed to aid it in making the school placement decision. Moreover, we have little doubt that the court would also have the competence to determine whether the District had complied with its obligation to assign a particular homeless child to a school that was in his best interests.

In recent years, the courts of this circuit have frequently been called upon to determine whether the District of Columbia public school system had met a comparable obligation under the Education for the Handicapped Act, 20 U.S.C. §§ 1400 *et seq.* (1988), which requires participating States to assure handicapped children of an "appropriate education." *See, e.g., Kerkam v. Superintendent, D.C. Public Schools*, 931 F.2d 84 (D.C. Cir. 1991); *Knight by Knight v. District of Columbia*, 877 F.2d 1025 (D.C. Cir. 1989). Although the criteria and procedures set forth in the Education for the Handicapped Act are more detailed than those in the McKinney Act, the ultimate determination made under that Act—that the handicapped child's education is "appropriate" to his needs—is no less vague or amorphous than the one at issue here. As in *Kerkam* and *Knight*, should a dispute arise between the educational agency and the parents of the homeless child as to whether the school to which the child has been assigned is in his best interest, a court is clearly competent to consider the testimony of opposing witnesses and to decide whether the agency's determination of the child's best interest was reasonable.

We conclude, from the foregoing, that section 11432(e)(3) of the McKinney Act confers enforceable rights on its beneficiaries and that appellants may invoke section 1983 to enforce those rights.

III. Conclusion

For the foregoing reasons, we reverse the district court's order granting the District's motion to dismiss and remand the case for further proceedings in accordance with this opinion.

So ordered.

SENTELLE, *Circuit Judge, dissenting:* I respectfully dissent from the court's conclusion that the McKinney Homeless Assistance Act, 42 U.S.C. § 11301 *et seq.* (1988), creates a federal right enforceable under 42 U.S.C. § 1983. I do so recognizing that the question is a close one, though in my mind it should not be. That is, I agree with Justice Powell that the Supreme Court in *Maine v. Thiboutot*, 448 U.S. 1 (1980), by holding "almost casually, that 42 U.S.C. § 1983 creates a cause of action for deprivations ... of any federal statutory right" distorted the Civil Rights Act far beyond any support in its then already lengthy history. 448 U.S. at 11 (Powell, J., dissenting, for himself, Chief Justice Burger and then-Justice Rehnquist). That said, I of course recognize that it is not within our compass to pick and choose which Supreme Court opinions we follow. Nonetheless, in my view, the district court reached the proper result and I would affirm.

Although the Supreme Court has counseled us that in the post-*Thiboutot* framework of § 1983 interpretation "each statute must be interpreted by its own terms," *Suter v. Artist M.*, 112 S. Ct. 1360, 1367 n.8 (1992), obviously, the high court's prior interpretations of other statutes instructs our interpretation of the present one. In *Suter*, as the majority points out today, the Supreme Court found no right enforceable under § 1983 in the Child Welfare Act. In *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990), the Supreme Court did find such a right in the Boren Amendment to the Medicaid Act. The majority opinion today does a commendable job of cataloging the similarities and differences between the two cases and I will not rehash them. I do not disagree with the majority's summary of either case, only with its conclusion as to the side upon which the McKinney Act falls.

As the majority notes, the *Suter* decision was based at least in part upon the conclusion "that the [statutory] directive to use reasonable efforts was so open-ended, and the resulting state discretion so broad, that judicial enforcement was an impossibility." Maj. op. at 9. That is to say, whatever other grounds may exist for denying judicial enforcement to statutorily-created federal "rights" under § 1983, the "judicial enforcement" of such rights "requires that they not be overly

'vague and amorphous.' " Maj. op. at 14 (quoting *Wilder*, 496 U.S. at 519). Therefore, for us to undertake judicial enforcement of rights under the McKinney Act presupposes an ability by the federal courts to carry out for the recalcitrant state the duty of determining school assignments in the "best interests" of children and youths. To me this is no less vague and amorphous than the "reasonable efforts" language which the Supreme Court in *Suter* held insufficient to create such an enforceable right.

Certainly the majority is correct that in other circumstances courts must determine the "best interests" of particular children. However, the usual exercise of judicial wisdom in pursuit of the "best interests" of a particular child is just that—a particularized one. Here, the courts would be called upon to make programmatic decisions not as to the best interest of a particular child, but as to how a grant-augmented state program should be designed to meet the needs of *groups* of particularized children. The programmatic operation of a state agency is not within the judicial competence.

Finally, it appears to me that the genuine statutory duty of a recipient state under the McKinney Act is to "prepare and carry out" a plan, "*designed to*" achieve nine designated goals. 42 U.S.C. §§ 11432(c)(4) & 11432(e)(1). Given the amorphousness of the "designed to" mandate, I do not see how this differs in a controlling way from the Adoption Act construed in *Suter*. There the Court held that statute did not create a right enforceable under § 1983 because it did not "place[ ] any requirement for state receipt of federal funds other than the requirement that the State submit a plan to be approved by the Secretary." *Suter*, 112 S. Ct. at 1369. The mandating paragraphs of the McKinney Act listed by the majority do not change this. The Adoption Act also contained descriptions of the relevant plan. Indeed, 42 U.S.C. § 671 provided a description of the required plan approximately as detailed, and with as many uses of mandatory words such as "shall" and "will," as does the McKinney Act

outlined in the majority opinion. Nonetheless, the Supreme Court held that the statute did not create a civil right enforceable under § 1983.

In my view, the district court in the present case properly deemed *Suter* rather than *Wilder* controlling. I would therefore affirm.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1993

USDC CV 92-0910

No. 92-7143

BRENDA LAMPKIN, AS LEGAL GUARDIAN OF
JESSICA LAMPKIN AND CHRISTINE LAMPKIN, MINORS, *et al.*
Appellants,

v.

DISTRICT OF COLUMBIA,
A MUNICIPAL CORPORATION, *et al.*,
Appellees

Appeal from the United States District Court for the District of Columbia

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BEFORE: EDWARDS, BUCKLEY and SENTELLE, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from in this cause is hereby reversed and the case is remanded, in accordance with the Opinion for the Court filed therein this date.

Per Curiam
For The Court:

RON GARVIN, *Clerk*

/s/ BY: Robert A. Bonner

ROBERT A. BONNER
Deputy Clerk

FILED: JULY 1, 1994

Opinion for the Court filed by Circuit Judge Buckley.

Dissenting opinion filed by Circuit Judge Sentelle.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION No. 92-0910 (RCL)

BRENDA LAMPKIN, AS LEGAL GUARDIAN OF JESSICA LAMPKIN AND CHRISTINE LAMPKIN, MINORS, *et al.*,
Plaintiffs,

v.

DISTRICT OF COLUMBIA, *et al.*,
Defendants.

MEMORANDUM OPINION

This matter comes before the court upon plaintiffs' motion for preliminary injunction and defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiffs in this matter are ten homeless parents[1] (who are bringing this action on behalf of their children) and the National Law Center on Homelessness and Poverty. Defendants are the District of Columbia, Sharon Pratt Kelly in her official capacity as Mayor of the District of Columbia, the District of Columbia Public Schools, and Dr. Franklin L. Smith in his official capacity as the Superintendent of the District of Columbia public school system.

Plaintiffs bring this action for declaratory and injunctive relief pursuant to section 1983 of the Civil Rights Act, 42 U.S.C. § 1983 (1981 and Supp. 1991) ("section 1983"). Plaintiffs contend that defendants have denied plaintiffs' rights under Title VI of the Stewart B. McKinney Homeless Assistance Act, 42 U.S.C. §§ 11421-11432 (Supp. 1991). For the following reasons, plaintiffs' motion for preliminary

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[1] The ten parents are: Brenda Lampkin, Sadie Chatmon, Denise Dabney, Barbette Fribbley, Dawn Harvell, Gail Mason, Twana Robb, Maria Summers, Patricia Sumpter and Cherise Thornes.

injunction shall be denied and defendants' motion to dismiss shall be granted.

I. FACTS

In 1987, Congress passed the Stewart B. McKinney Homeless Assistance Act. 42 U.S.C. §§ 11421-11432 (Supp. 1991) ("McKinney Act" or "the Act"). The Act is based upon Congress' policy that state educational systems shall assure that homeless children have equal access to free education.[2] Title VI, Part B of the Act, entitled Education for Homeless Children and Youth, is basically a grant statute. It authorizes the Secretary of Education to grant federal funds to states so that these states can carry out the activities that are described in subsections (c), (d) and (e) of section 11432. *Id.* at § 11432(a). In the present case, the District of Columbia[3] received $50,000.00 pursuant to the Act. *See id.* at § 11432(b).

Pursuant to subsection (c) of section 11432, these funds are to be used to, among other things: carry out the policies of the Act; provide such services and activities to homeless children and youths to enable them to enroll in, attend and achieve in school; carry out the state plan (discussed *infra*); and to develop and implement programs for school personnel to heighten awareness of the specific problems that surround the education of homeless children and youth. *Id.* at § 11432(c). The relevant portions of subsection (d) state that the Coordinator of Education of Homeless Children and

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[2] 42 U.S.C. § 11431 provides that:

> (1) each State educational agency shall assure that each child of a homeless individual and each homeless youth have access to a free, appropriate public education which would be provided to the children of a resident of a State and is consistent with the state school attendance laws;
>
> . . .
>
> (3) homelessness alone should not be sufficient reason to separate students from the mainstream school environment.

[3] The District of Columbia is considered a "state" for the purposes of Title VI of the McKinney Act. *See* 42 U.S.C. § 11421(d).

Youth shall facilitate coordination between various state agencies and shall develop relationships between various educational programs and providers to "improve the provision of comprehensive services to homeless children and homeless youths and the families of such children and youths" *Id.* at § 11432(d)(4),(5).

Most of plaintiffs' claims are based upon defendants' alleged failure to comply with subsection (e). This subsection, entitled "State Plan," states that "[e]ach State shall adopt a plan to provide for the education of each homeless child or homeless youth within the State . . . ." *Id.* at § 11432(e)(1). Among other things, each state plan must authorize the state educational agency to make the necessary determinations under this section and address the various problems that stand in the way of educating homeless children. *See Id.* at § 11432(e)(1)(A)-(I).

Subsection (e) also provides in relevant part that:

> (2) Each plan adopted under this subsection shall assure, to the extent practicable under requirements relating to education established by State law, that local educational agencies within the State shall comply with the requirements of paragraphs (3) through (9).
>
> (3)(A) The local educational agency of each homeless child and each homeless youth shall either —
>
> > (i) continue the child's or youth's education in the school of origin —
> >
> > > (I) for the remainder of the academic year; or
> >
> > > (II) in any case in which a family member becomes homeless between academic years, for the following academic year; or
> >
> > (ii) enroll the child or youth in any school that nonhomeless students who live in the attendance area in which the child or youth is actually living are eligible to attend;
>
> whichever is in the child's best interest or the youth's best interest.

> (B) In determining the best interests of the child or youth for purposes of making a school assignment under subparagraph (A), consideration shall be given to a request made by a parent regarding school selection.
>
> . . .
>
> (5) Each homeless child shall be provided services comparable to services offered to other students in the school selected according to the provisions of paragraph (3), including transportation services, educational services for which the child meets the eligibility criteria, such as compensatory educational programs for the disadvantaged, and the educational programs for the handicapped and for students with limited English proficiency; programs for vocational education; programs for the gifted and talented; and school meal programs.
>
> (7) Each local educational agency serving homeless children or youth that receives assistance under this subchapter shall coordinate with local social services agencies, and other agencies or programs providing services to such children or youth and their families.
>
> (9) Each State and local educational agency shall review and revise any policies that may act as barriers to the enrollment of homeless children and youth in schools selected in accordance with paragraph (3). In reviewing and revising such policies, consideration shall be given to issues concerning transportation, requirements of immunization, residency, birth certificates, school records, or other documentation, and guardianship. Special attention shall be given to ensuring the enrollment and attendance of homeless children and youths who are not currently attending school.

Id. at § 11432(e).

Also relevant to this case is section 11432(f) of the Act. This section provides that "[n]o State may receive a grant under this section unless the State educational agency submits an application to the Secretary at such time, in such manner, and containing or accompanied by such information as the Secretary may reasonably require." *Id.* at § 11432(f). *See also id.* at § 11433(d)(1) (which provides that "[a] local educa-

tional agency that desires to receive a grant under this section shall submit an application to the State educational agency at such time, in such manner, and containing or accompanied by such information as the State agency may reasonably require according to the guidelines issued by the Secretary"). The application must include:

> (A) a description of the services and programs for which assistance is sought and the problems sought to be addressed through the provision of such services and programs;
>
> (B) assurances that the applicant complies with or will use requested funds to come into compliance with paragraphs (3) through (9) of section 11432(e) of this title;
>
> (C) an assurance that assistance under the grant will supplement and not supplant funds used before the award of the grant for purposes of providing services to homeless children and homeless youth;
>
> (D) a description of policies and procedures that the agency will implement to ensure that activities carried out by the agency will not isolate or stigmatize homeless children or homeless youth.

Id. at § 11[4]33(d)(1).

The final provision of the Act which is relevant to this case is section 11434. This section imposes various duties upon the Secretary of Education. This provision states, in relevant part, that:

> [i]n reviewing the State plans submitted by the State educational agencies under section 11432(e) of this title, the Secretary shall evaluate whether State laws, policies, and practices described in such plans adequately address the problems of homeless children and homeless youth relating to access to education and placement as described in such plans.

Id. at § 11434(b)(1).

Plaintiffs assert that defendants have failed to comply with Title VI of the McKinney Act in that defendants have: (1) failed to implement a best interest standard in placing home-

less children in schools; (2) failed to ensure transportation to and from the school that is in the best interest of homeless children to attend; (3) failed to coordinate social services and public education for homeless children, and to ensure access to comparable educational services and school meal programs; and (4) failed to provide access to free, appropriate public education for homeless children.

In addition to their section 1983 claims under the McKinney Act, plaintiffs allege that defendants violated their rights to equal protection under the Fifth Amendment to the United States Constitution. Plaintiffs state that although they are similarly situated to handicapped children in their need for transportation assistance, defendants provide transportation assistance to handicapped children and not to homeless children.

Defendants oppose plaintiffs' motion for preliminary injunction on the ground that plaintiffs are not entitled to injunctive relief. Further, in their motion to dismiss, defendants assert that plaintiffs have failed to state a claim upon which relief can be granted because plaintiffs do not have a private right of action under the McKinney Act for the relief sought and because they have failed to adequately plead an equal protection claim.

II. ANALYSIS

A. Legal Standard

Pursuant to the Federal Rules of Civil Procedure, the court may dismiss plaintiffs' claims for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). For the purposes of this motion, the court shall accept all of plaintiffs' allegations as true.

B. Section 1983

42 U.S.C. § 1983 provides a federal remedy for "the deprivation of any rights, privileges, or immunities secured by the Constitution and federal laws." Section 1983 is available as a remedy for violations of federal statutes as well as for constitutional violations. *See Maine v. Thiboutot*,

448 U.S. 1 (1980). Prior to the United States Supreme Court's ruling in *Suter v. Artist M.*, —— U.S. ——, 112 S. Ct. 1360 (1992), the Court had developed a two-part line of inquiry for determining whether section 1983 provides a remedy for a statutory violation. First, since section 1983 speaks in terms of "rights, privileges or immunities," not violations of federal law, the court must determine whether plaintiff asserted a violation of a federal right. *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989). The Supreme Court has recognized three basic considerations that courts should consider when finding whether plaintiffs assert a violation of a right. First, courts should consider whether the provision at issue creates a binding obligation upon the government, in which case a federal right would be created, or whether the provision does "no more than express a congressional preference for certain kinds of treatment," in which case no federal right would be created. *Id.* (quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 19 (1981)). Second, courts should consider whether the interest is "too vague and amorphous" so that it is considered "beyond the competency of the judiciary to enforce." *Golden State*, 493 U.S. at 106 (quoting *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 431-32 (1987)). If so, then no federal right is created. Third, courts should consider whether the provision in question was "inten[ded] to benefit" the plaintiff. *Golden State*, 493 U.S. at 106 (quoting *Wright*, 479 U.S. at 430)). If so, then a federal right may be created.

Second, should the court find that plaintiffs have asserted a federal right, section 1983 provides a remedial cause of action "unless the state actor demonstrates by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement." *Wright*, 479 U.S. at 418. Defendants must demonstrate that Congress has "specifically foreclosed a remedy under § 1983" by providing a comprehensive enforcement mechanism to protect a federal right. *Golden State*, 493 U.S. at 106 (quoting *Smith v. Robinson*, 468 U.S. 992, 1005 n. 9 (1984)). *See also Middlesex County Sewage Authority v. National Sea Clam-*

mers Ass'n., 453 U.S. 1 (1981). The Supreme Court has stated that "[w]e do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy" for the deprivation of a federal right. *Wright*, 479 U.S. at 418-419 (quoting *Smith*, 468 U.S. at 1012)). The Court rarely finds that a remedial scheme established by Congress is sufficient to displace the remedy that is provided by § 1983.[4] *See Wilder*, 110 S. Ct. at 2523.

The availability of an administrative mechanism is not necessarily seen by the Court as sufficient to show that Congress intended to foreclose a section 1983 remedy. *Golden State*, 493 U.S. at 106 (cites omitted). Rather, a private right of action under section 1983 is foreclosed "only when the statute itself creates a remedial scheme that is 'sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under § 1983.' " *Wilder v. Virginia Hospital Ass'n.*, 496 U.S. 498, 110 S. Ct. 2510, 2523 (1990) (quoting *Sea Clammers*, 453 U.S. 1, 20 (1981)).

Moreover, the Court has also held that the generalized authority to cut off federal funds is "insufficient to indicate a congressional intention to foreclose § 1983 remedies." *Wright*, 479 U.S. at 428 (cites omitted). *See also Wilder*, 110.S. Ct. at 2524; *Suter*, 112 S. Ct. at 1376 (Blackmun, J., dissenting) (in which Justice Blackmun noted that "ever since *Rosado v. Wyman*, 397 U.S. 397 (1970), the power of the secretary to enforce congressional spending conditions by cutting off funds has not prevented the federal courts from enforcing the same conditions").

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[4] In *Wilder*, the Court noted that it has found that Congress's remedial scheme was sufficient to displace section 1983 only on two occasions. In *Sea Clammers*, the Court held that the enforcement scheme that was created in the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*, demonstrated congressional intent to foreclose the section 1983 remedy because it granted the Environmental Protection Agency considerable enforcement power through the use of noncompliance orders, civil suits, criminal penalties and two citizen-suit provisions. *Sea Clammers*, 453 U.S. at 13. In the other case, *Smith v. Robinson*, the Court held that the administrative scheme set forth in the Education of the Handicapped Act, which contained a "carefully tailored administrative and judicial mechanism" foreclosed section 1983 as a remedy. *Smith v. Robinson*, 468 U.S. 992, 1009 (1984).

In *Suter*, which is factually similar to the present case, the Court broke from this line of inquiry. *See Suter*, 112 S. Ct. at 1376 (Blackmun, J., dissenting).[5] The issue presented in *Suter* was whether section 1983 permits private individuals the right to enforce the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 620-628, 670-679a ("Adoption Act"). The Adoption Act established a federal reimbursement program for various expenses incurred by states in administering foster care and adoption services. *Suter*, 112 S. Ct. at 1363. The Act provided that states which satisfy the Act's requirements will be reimbursed for a percentage of foster care and adoption assistance programs. *Id.*

In order to participate in the reimbursement program, the Adoption Act required that states submit a plan to the Secretary of Health and Human Services for approval by the Secretary. *Id.* at 1363-64. The Adoption Act listed 16 qualifications that state plans must contain in order to gain the Secretary's approval. *Id.* at 1364. One of the requisite features was that "reasonable efforts will be made [by the state agency] (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home." *Id.* (quoting 42 U.S.C. § 671(a)(15)).

Respondents in *Suter* filed a class-action suit seeking declaratory and injunctive relief under the Adoption [A]ct *Id.* at 1364. Respondents claimed that the state agency, in violation of the Adoption Act, "failed to make reasonable efforts to prevent removal of children from their homes and to facilitate reunification of families where removal had occurred." *Id.* (footnote omitted). The United States District Court for the Northern District of Illinois found that the Adoption Act created a right of action under section 1983. *Artist M. v. Johnson*, 726 F. Supp. 690 (N.D. Ill. 1989). The United States Court of Appeals for the Seventh Circuit, relying

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[5] In his dissent, Justice Blackmun stated that "the Court reache[d] its conclusion without even stating, much less applying, the principles our precedents have used to determine whether a statute has created a right enforceable under § 1983." *Suter*, 112 S. Ct. at 1371.

primarily upon *Wilder*, affirmed, holding that the "reasonable efforts" clause of the Adoption Act could be enforced under section 1983. *Artist M. v. Johnson*, 917 F.2d 980 (7th Cir. 1990).

The Supreme Court reversed and held that the Adoption Act does not confer an enforceable right of action based on section 1983. *Suter*, 112 S. Ct. at 1365. The Court held that the fact that the language of 42 U.S.C. § 671(a)(15) is mandatory in its terms does not alone create a right that is enforceable under section 1983. Rather, the Court considered exactly what the Act required the states to do. *Id.* at 1367. The Court then held that the Adoption Act only required that states have their plans approved by the Secretary, meaning that their plans must contain the 16 features that are required by the statute. *Id.* The Court then recognized that Illinois' state plan was approved by the Secretary. *Id.* The Court distinguished the Adoption Act from the statute in *Wilder*, a case in which the Court found . . . an enforceable right, because the statute in *Wilder* actually required that states adopt reasonable and adequate rates.[6] *Id.* at 1368.

Title VI of the McKinney Act, Part B, closely resembles the Adoption Act in *Suter* in two ways. First, like the Adoption Act, portions of the McKinney Act are mandatory in their terms. For example, 42 U.S.C. § 11432(e)(3)(A) provides that the local educational agency "shall either — continue the child's or youth's education in the school of origin . . . or . . . enroll the child or youth in any school that nonhomeless students who live in the attendance area in which the child or youth is actually living are eligible to attend; whichever is in the child's best interest or in the youth's best interest." According to *Suter*, however, such mandatory language alone does not create a right of action under § 1983. Rather, the court must determine exactly what the McKinney Act requires defendants to do.

[6] The Court also held that the "reasonable efforts" clause in § 671(a)(15) of the Adoption Act does not confer an enforceable right upon the Adoption Act's beneficiaries, but rather "it impose[s] only a generalized duty on the State, to be enforced not by private individuals, but by the Secretary . . . ." *Suter*, 112 S. Ct. at 1368-69.

The second similarity between the McKinney Act and the Adoption Act is the fact that both statutes only require states to submit plans or applications to be approved by the federal government. Title VI of the McKinney Act authorizes the Secretary of Education to grant federal funds to state educational agencies so that these agencies may carry out the activities that are authorized in subsections (c), (d) and (e) of section 11432. 42 U.S.C. § 11432(a), (b). One of these activities is preparing and carrying out a state plan which must comply with the requirements that are set forth in subsection (e). *Id.* at § 11432(d), (e). The state plan is designed to assure that local agencies comply with the provisions that are set forth in § 11432(e)(3) through (9), the sections which contain the mandatory language that plaintiffs point to in claiming that the Act creates a private right of action. *Id.* at § 11432(e)(2).

Section 11432(f) of the McKinney Act provides that no state may receive grants under the Act unless it submits a proper application to the Secretary of Education. Such an application must, among other things, assure that the applicant will use its federal funds to come into compliance with the requirements of section 11432(e)(3)-(9). The final piece of this statutory framework is provided by section 11434. This section requires the Secretary of Education to assure that the State educational agencies' applications are proper in order for it to grant federal funds under this statute.

Thus, much like the Adoption Act in *Suter*, the McKinney Act does not confer an enforceable right upon plaintiffs.[7] Rather, the only requirement that the Act imposes upon states is the duty to submit a proper application if the state wishes to receive federal funding to educate homeless children. *See id.* at § 11432(f); § 11433(d). The only enforceable duty that the Act may impose is upon the Secretary of

[7] Due to the similarity between the McKinney Act in the present case and the Adoption Act in *Suter*, the court shall follow the analysis that the Supreme Court applied in *Suter*. Accordingly, the court does not reach . . . the issue of whether Title VI of the McKinney Act would create an enforceable right of action pursuant to section 1983 under the Supreme Court's pre-*Suter* jurisprudence.

Education. The Secretary must comply with section 11434 and review state plans as well as state laws, policies and practices to assure that the states adequately address the problems of educating homeless children before the Secretary may grant federal funds to each state. *See id.* at § 11434(b)(1).

Accordingly, like in *Suter*, the mandatory language that is cited by plaintiffs in section 11432(e)(3)-(9) does not create an enforceable right under section 1983. Rather, this language merely sets forth the criteria that the Secretary must consider when deciding whether a state's application is proper. *See id.* at § 11434(b)(1). It is then up to the Secretary to determine whether the states' applications are adequate and whether the states deserve a federal grant. *See id.* Consequently, the court shall grant defendants' motion to dismiss plaintiffs' section 1983 claims because plaintiffs have failed to state a claim upon which relief can be granted.[8]

C. Implied Right of Action

In *Suter*, after finding that the Adoption Act did not create an enforceable right of action under section 1983, the Court briefly addressed whether the Adoption Act contained an implied right of action. The Court applied the familiar test from *Cort v. Ash*, 422 U.S. 66 (1975), and held that the Adoption Act did not. In the present case, plaintiffs' statutory claims are based solely upon section 1983 and not directly under the McKinney Act. Thus the court need not address whether the McKinney Act creates an implied right of action. Even if the court were to address this issue, however, the court would conclude that the McKinney Act does not contain an implied right of action.

In *Cort*, the United States Supreme Court set forth a four-part test for determining whether a statute creates an implied right of action. The four factors are:

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[8] Since the court shall grant defendants' motion to dismiss on the ground that plaintiffs do not have a right of action under section 1983, the court need not pass on whether defendants have actually complied with the McKinney Act.

> [f]irst, is the plaintiff one of the class for whose *especial* benefit the statute was enacted, that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action solely on federal law?

Id. at 78 (internal quotation marks omitted; emphasis in original).

In the present case, although plaintiffs are in the class for whose benefit the statute was created, it is the judgment of the court that the second and third factors of this test have not been met. As is discussed above, given the overall scheme of Title VI of the McKinney Act and the lack of legislative history on this issue,[9] the court cannot find that Congress intended to imply a private right of action as a remedy for this statute. The only duty that Congress intended to impose was upon the Secretary of Education to grant funds only to those states which submitted a proper application.

In addition, granting an implied right of action in this case would be inconsistent with the McKinney Act's overall statutory scheme. When read in its entirety, it is evident that the Act is designed to provide federal assistance to those states that choose to provide these program to help educate homeless children. These grants are made only if the states submit a proper application and the decision to grant federal funds is left to the Secretary upon his review of the states' applications, laws and policies. Thus, according to the letter of the Act, the remedy for a state's failure to comply with its state plan lies with the Secretary of Education, not with

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[9] The parties have not cited, and the court has not uncovered, any legislative history that is relevant to this inquiry.

parties like plaintiffs. To find an implied right of action in this case would be the equivalent of the judiciary rewriting the statute.

D. Equal Protection

The court shall also dismiss plaintiffs' equal protection claim. In *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954), the United States Supreme Court held that the equal protection guaranties that are provided in the Fourteenth Amendment to the Constitution are applicable to the District of Columbia through the equal protection component of the Due Process Clause of the Fifth Amendment. The Equal Protection Clause of the Fourteenth Amendment essentially commands that all persons that are similarly situated should be treated alike. *Cleburn v. Cleburn Living Center, Inc.*, 473 U.S. 432, 439 (1984) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). When a law is challenged on equal protection grounds, the general rule is that the law is presumed to be valid and will be sustained if the classification that is drawn by the statute is rationally related to a legitimate government interest. *Cleburn*, 473 U.S. at 440 (cites omitted). In the present case, both parties agree that education is not a fundamental right and that no suspect classes are involved. *See Kadrmas v. Dickenson Public Schools*, 487 U.S. 451, 457-58 (1988). Thus, both parties recognize that rational basis scrutiny is appropriate for evaluating this claim.

Plaintiffs assert that defendants have violated their equal protection rights because defendants refuse to provide homeless children with necessary transportation assistance to and from school but defendants do provide transportation assistance to mentally and physically handicapped children. Defendants do treat homeless children differently than handicapped children for the purposes of providing transportation assistance to and from school. The court cannot find, however, that this disparate treatment violates plaintiffs' rights to equal protection under the Fifth and Fourteenth Amendments.

Defendants are required to provide transportation assistance to handicapped children under the Education for

All Handicapped Children Act, 20 U.S.C. § 1400 *et seq*. This Act defines handicapped children as children:

> (A) with mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbances, orthopedic impairment, autism, traumatic brain injury, other health impairments, or special learning disabilities; and
>
> (B) who, by reason thereof need special education and related services.

Id. at § 1401(a)(1). The Act provides that transportation is a "related service" under 20 U.S.C. § 1401(a)(17).

Defendants have a rational basis for treating handicapped children differently than homeless children for the purposes of providing transportation assistance to and from school. Handicapped children, because of their disability, are by definition less able to travel to school than non-disabled children. Plaintiffs have failed to show that homeless children, by virtue of their homelessness alone, are physically or mentally less capable of travelling to school than nonhomeless children.

A separate order shall issue this date.

/s/ Royce C. Lamberth

ROYCE C. LAMBERTH
United States District Judge

DATE: JUNE 9, 1992.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 92-0910 (RCL)

BRENDA LAMPKIN, AS LEGAL GUARDIAN OF JESSICA LAMPKIN AND CHRISTINE LAMPKIN, MINORS, *et al.*,
Plaintiffs,

v.

DISTRICT OF COLUMBIA, *et al.*,
Defendants.

ORDER

This matter comes before the court upon plaintiffs' motion for preliminary injunction and defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons stated in the court's memorandum opinion of this date, it is hereby ORDERED that

1. Defendants' motion to dismiss is GRANTED.
2. Plaintiffs' motion for preliminary injunction is DENIED as moot.
3. This case stands DISMISSED WITH PREJUDICE

SO ORDERED.

/s/ Royce C. Lamberth
ROYCE C. LAMBERTH
United States District Judge

DATE: JUNE 9, 1992.

Part B—Education for Homeless Children and Youth

§ 11431. Statement of policy

It is the policy of the Congress that—

(1) each State educational agency shall assure that each child of a homeless individual and each homeless youth have access to a free, appropriate public education which would be provided to the children of a resident of a State and is consistent with the State school attendance laws;

(2) in any State that has a residency requirement as a component of its compulsory school attendance laws or other laws, regulations, practices or policies that may act as a barrier to the enrollment, attendance, or success in school of homeless children and homeless youth, the State will review and undertake steps to revise such laws to assure that the children of homeless individuals and homeless youth are afforded a free and appropriate public education.

(3) homelessness alone should not be sufficient reason to separate students from the mainstream school environment.

(Pub.L. 100-77, Title VII, § 721, July 22, 1987, 101 Stat. 525; Pub.L. 101-645, Title VI, § 612, Nov. 29, 1990, 104 Stat. 4735.)

§ 11432. Grants for State and local activites for the education of homeless children and youth

(a) General authority

The Secretary of Education is, in accordance with the provisions of this section, authorized to make grants to States to carry out the activities described in subsections (c), (d), and (e) of this section.

(b) Allocation and reservation of amounts

* * *

(c) Authorized activities

Grants under this section shall be used—

(1) to carry out the policies set forth in section 11431 of this title in the State;

(2) to provide activities for and services to homeless children and homeless youths that enable such chidlren and youths to enroll in, attend, and achieve success in school;

(3) to establish or designate an Office of Coordinator of Education of Homeless Children and Youth in accordance with subsection (d) of this section;

(4) to prepare and carry out the State plan described in subsection (e) of this section;

(5) to develop and implement programs for school personnel to heighten awareness of specific problems of the education of homeless children and youth; and

(6) if amounts appropriated for the applicable fiscal year exceed the amount appropriated for fiscal year 1990 under this section, to provide grants to local educational agencies for purposes of this section, and if such amounts appropriated do not exceed the amount appropriated for fiscal year 1991, the State education agency, at the discretion of such agency, may provide such grants.

(d) Functions of the Office of Coordinator

The Coordinator of Education of Homeless Children and Youth established in each State shall—

(1) once every 2 years, gather data on the number and location of homeless children and youth in the State, and such data gathering shall include number of homeless children and homeless youths enrolled in schools in the State, determined through random sampling or other statistical methods that ensure that such children and youths are not overtly identified as being homeless, the nature and extent of problems of access to, and placement of, homeless children and homeless youth in ele-

mentary and secondary schools, the difficulties in identifying the special needs of such chidlren, and any progress made by the State educational agency and local educational agencies within the State in addressing such problems and difficulties;

(2) develop and carry out the State plan described in subsection (e) of this section;

(3) prepare and submit to the Secretary not later than December 31, 1991, and on December 31 of every second year thereafter a report on the data gathered pursuant to paragraph (1);

(4) facilitate coordination between the State education agency, the State social services agency, and other agencies providing services to homeless children and youth and their families; and

(5) develop relationships and coordinate with other relevant education, child development, or preschool programs and providers of services to homeless children, homeless families, and runaway and homeless youths (including domestic violence agencies, shelter operators, transitional housing facilities, runaway and homeless youth centers, and transitional living programs for homeless youths) in order to improve the provision of comprehensive services to homeless children and homeless youths and the families of such children and youths.

To the extent that reliable current data is available in the State, each coordinator described in this subsection may use such data to fulfill the requirements of paragraph (1).

(e) State plan

(1) Each state shall adopt a plan to provide for the education of each homeless child or homeless youth within the State which will contain provisions designed to—

(A) authorize the State educational agency, the local educational agency, the parent or guardian of the homeless child, the homeless youth, or the applicable

social worker to make the determinations required under this section;

(B) provide procedures for the prompt resolution of disputes regarding the educational placement of homeless children and youth;

(C) develop programs for school personnel (including principals, attendance officers, teachers, and enrollment personnel), to heighten the awareness of such personnel of the specific educational needs of runaway and homeless youths; and

(D) ensure that homeless children and homeless youths who meet the relevant eligibility criteria are able to participate in Federal, State, or local food programs.

(E) ensure that homeless children and homeless youths who meet the relevant eligibility criteria are able to participate in Federal, State, or local before- and after-school care programs and provide for the disclosure of data concerning the participation of such children in such programs in plans submitted by the State after the initial plan of the State;

(F) address problems set forth in the report provided to the Secretary under subsection (d)(3) of this section;

(G) address problems with respect to the education of homeless children and homeless youths, including problems caused by—

(i) transportation issues; and

(ii) enrollment delays which are caused by—

(I) immunization requirements;

(II) residency requirements;

(III) lack of birth certificates, school records, or other documentation;

or

(IV) guardianship issues;

(H) demonstrate that the State and local educational agencies in the State have developed and will review and revise policies to remove barriers to the enrollment and

retention of homeless children and homeless youths in schools of the State; and

(I) ensure that the State educational agency and local educational agencies within the State will adopt policies and practices to ensure that homeless children and homeless youths are not isolated or stigmatized.

(2) Each plan adopted under this subsection shall assure, to the extent practicable under requirements relating to education established by State law, that local educational agencies within the State will comply with the requirements of paragraphs (3) through (9),

(3)(A) The local educational agency of each homeless child and each homeless youth shall either—

(i) continue the child's or youth's education in the school of origin—

(I) for the remainder of the academic year; or

(II) in any case in which a family becomes homeless between academic years, for the following academic year; or

(ii) enroll the child or youth in any school that nonhomeless students who live in the attendance area in which the child or youth is actually living are eligible to attend;

whichever is in the child's best interest or the youth's best interest.

(B) In determining the best interests of the child or youth for purposes of making a school assignment under subparagraph (A), consideration shall be given to a request made by a parent regarding school selection.

(C) For purposes of this paragraph, the term "school of origin" shall mean the school that the child or youth attended when permanently housed, or the school in which the child or youth was last enrolled.

(4) The choice regarding placement shall be made regardless of whether the child or youth is living with the

homeless parents or has been temporarily placed elsewhere by the parents.

(5) Each homeless child shall be provided services comparable to services offered to other students in the school selected according to the provisions of paragraph (3), including transportation services, educational services for which the child meets the eligibility criteria, such as compensatory educational programs for the disadvantaged, and educational programs for the handicapped and for students with limited English proficiency; programs in vocational education; programs for the gifted and talented; and school meals programs.

(6) Any record ordinarily kept by the school, including immunization records, academic records, birth certificates, guardianship records, and evaluations for special services or programs, of each homeless child or youth shall be maintained—

(A) so that the records are available, in a timely fashion, when a child or youth enters a new school district; and

(B) in a manner consistent with section 1232g of Title 20.

(7) Each local educational agency serving homeless children or youth that receives assistance under this subchapter shall coordinate with local social services agencies, and other agencies or programs providing services to such children or youth and their families.

(8) Each local educational agency that receives assistance under this subchapter shall designate a homelessness liaison to ensure that—

(A) homeless children and youth enroll and succeed in the schools of that agency; and

(B) homeless families, children and youth receive educational services for which they are eligible, and referrals to health care services, dental services, mental health services, and other appropriate services.

State coordinators and local educational agency liaisons shall inform school personnel, service providers and advocates working with homeless families of the duties of the liaisons.

(9) Each State and local educational agency shall review and revise any policies that may act as barriers to the enrollment of homeless children and youth in schools selected in accordance with paragraph (3). In reviewing and revising such policies, consideration shall be given to issues concerning transportation, requirements of immunization, residency, birth certificates, school records, or other documentation, and guardianship. Special attention shall be given to ensuring the enrollment and attendance of homeless children and youths who are not currently attending school.

(f) Application

No State may receive a grant under this section unless the State educational agency submits an application to the Secretary at such time, in such manner, and containing or accompanied by such information as the Secretary may reasonably require.

(g) Authorization of appropriations

(1) There is authorized to be appropriated to carry out this section $50,000,000 for fiscal year 1991, and such sums as may be necessary for each of the fiscal years 1992 and 1993.

(2) The State educational agency may reserve not to exceed 5 percent of the amount received by such agency under this section in each fiscal year, or an amount equal to the amount received by such State agency for State activities under this section in fiscal year 1990, whichever is greater, to conduct activities under paragraphs (1) through (5) of subsection (c) of this section.

(3)(A) In any fiscal year in which the amount appropriated under paragraph (1) does not equal or exceed $100,000,000, the State educational agency shall use funds not otherwise reserved under paragraph (2) to award grants to local educational agencies in accordance with subsection (c)(6) of this section.

(B) In any fiscal year in which the amount appropriated under paragraph (1) equals or exceeds $100,000,000, the State educational agency shall use funds not otherwise reserved under paragraph (2) to allocate to each local educational agency an amount that bears the same ratio to amount not otherwise reserved as the aggregate amount received by such local educational agency under part A of chapter 1 of title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C.A. § 2711 et seq.] for such fiscal year bears to the aggregate amount received by all local educational agencies in the State for purposes of carrying out such part for such fiscal year.

(4) Sums appropriated in each fiscal year shall remain available for the succeeding fiscal year.

(Pub.L. 100-77, Title VII, § 722, July 22, 1987, 101 Stat. 525, amended Pub.L. 100-628, Title VII, § 702(a), Nov. 7, 1988, 102 Stat. 3245; Pub.L. 101-625, Title VI, § 612(b), Nov. 29, 1990, 104 Stat. 4735.)

§ 11433. Local educational agency grants for the education of homeless children and youth

(a) General authority

(1) Grantees and purpose of grants

The State educational agency shall, in accordance with section 11432(c)(6) of this title and from amounts made available to such agency under section 11432 of this title, make grants to local educational agencies for the purpose of facilitating the enrollment, attendance and success of homeless children and youths in schools.

(2) Use of grants

Unless otherwise specified, services under paragraph (1) may be provided through programs on school grounds or at other nonsectarian facilities. Where services are provided through programs on school grounds, such services may also be made available to children or youths who are determined by the local educational agency to be at risk of failing in or dropping out of schools, except that priori-

ty for such services shall be given to homeless children and homeless youths. To the maximum extent practicable, services shall be provided though existing programs and mechanisms that integrate homeless individuals with nonhomeless individuals.

(3) Regular academic program

Services provided under his section are not intended to replace the regular academic program.

(b) Authorized activities

(1) Primary activities

Not less than 50 percent of amounts provided under a grant under this section shall be used to provide tutoring, remedial education services, or other education services to homeless children or homeless youths.

(2) Related activities

Not less than 35, nor more than 50, percent of the amounts provided under a grant under this section may be used for activities that may include—

(A) the provision of expedited evaluations of the strengths and needs of homeless children and homeless youths, including needs and eligibility for programs and services (including gifted and talented programs, special education programs, programs for students with limited English proficiency, and remedial services);

(B) professional development for educators and other school personnel that is designed to develop awareness and sensitivity to the needs of homeless children and homeless youths and rights of such children and youths under this chapter;

(C) the provision of referral services to homeless children and homeless youths for medical, dental, mental, and other health services;

(D) the provision of assistance to defray the excess cost of transportation for students not provided under section 11432(e)(5) of this title and not otherwise provided through Federal, State, or local fund-

ing, where necessary to enable students to attend the school selected under section 11432(e)(3) of this title;

(E) the provision of developmentally appropriate early childhood programs for preschool age children;

(F) the provision of before- and after-school and summer programs for homeless children or homeless youths in which a teacher or other qualified individual provides tutoring, homework assistance, and supervision of educational activities;

(G) where necessary, the payment of fees and other costs asssociated with tracking, obtaining, and transferring records necessary to enroll homeless children or homeless youths in school, including birth certificates, immunization records, academic records, guardianship records, and evaluations for special programs or servcies;

(H) the provision of parent education and training to the parents of homeless children and homeless youths about the rights of and resources available to such children and youths;

(I) the development of coordination between schools and agencies providing services to homeless children and homeless youths;

(J) the provision of counseling, social work and psychological services, including violence counseling, and referrals for such services;

(K) activities to address the particular needs of homeless children and homeless youths that may arise from domestic violence;

(L) activities to develop and implement programs for school personnel to heighten the awareness of such personnel of the specific educational needs of runaway and homeless youths;

(M) the adaptation of space and the purchase of supplies for nonschool facilities made available under subsection (a)(2) of this section to provide services under this subsection;

(N) the provision of school supplies to be distributed at the shelter or temporary housing facilities; and

(O) the provision of such other extraordinary or emergency assistance determined by the Secretary as essential to enable homeless children and youth to attend school.

(3) Eligibility

No State or local educational agency may receive a grant under this section unless the State in which the agency is located has submitted a State plan as required by section 11432(e) of this title.

(c) Awards

(1) Basis

Except as provided in section 11432(g)(3)(B) of this title; from amounts appropriated for each fiscal year under section 11432(g) of this title, the State educational agency may award grants under this section to local educational agencies submitting an application under subsection (d) of this section on the basis of the need of such agencies.

(2) Determination

In determining need under paragraph (1), the State educational agency may consider the number of homeless children and homeless youth enrolled in preschool, elementary, and secondary schools within the area served by the agency, and shall consider the needs of such children and youth, and the ability of the agency to meet such needs. Such agency may also consider—

(A) the extent to which the proposed use of funds would facilitate the enrollment, retention, and educational success of homeless children and youth;

(B) the extent to which the application reflects coordination with other local and State agencies that serve homeless children and youth, as well as the State plan required by section 11432(e) of this title;

(C) the extent to which the applicant exhibits in the application and in current practice a commitment to education for all homeless children and youth in its jurisdiction; and

(D) other criteria as the agency determines appropriate.

(d) Application

(1) In general

A local educational agency that desires to receive a grant under this section shall submit an application to the State educational agency at such time, in such manner, and containing or accompanied by such information as the State agency may reasonable require according to guidelines issued by the Secretary. Each such application shall include—

(A) a description of the services and programs for which assistance is sought and the problems sought to be addressed through the provision of such services and programs;

(B) assurances that the applicant complies with or will use requested funds to come into compliance with paragraphs (3) through (9) of section 11432(e) of this title;

(C) an assurance that assistance under the grant will supplement and not supplant funds used before the award of the grant for purposes of providing services to homeless children and homeless youths; and

(D) a description of policies and procedures that the agency will implement to ensure that activities carried out by the agency will not isolate or stigmatize homeless children and homeless youth.

(3)[1] Terms of awards

Grants awarded under this section shall be for terms of not to exceed 2 years.

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[1] So in original. There was no subpar. (2) enacted.

(e) Reports

Each State educational agency that receives a grant under this section for any fiscal year shall, as part of the plan of the State submitted under section 11432(c)(4) of this title, provide to Secretary data concerning—

(1) the number of homeless children and homeless youths served with assistance provided under the grant under this section; and

(2) a description of the success of the program under this section in allowing homeless children and homeless youths to enroll in, attend, and succeed in school.

(Pub.L. 100-77, Title VII, § 723, July 22, 1987, 101 Stat. 527; Pub.L. 100-628, Title VII, § 702(b), Nov. 7, 1988, 102 Stat. 3245; Pub.L. 101-645, Title VI, 612(c), Nov. 29, 1990, 104 Stat. 4739.)

§ 11434. National responsibilites

(a) General accounting office

The Comptroller General of the United States shall perpare and submit to the Congress not later than June 30, 1988, a report on the number of homeless children and youth in all States.

(b) Secretarial responsibilities

(1) The Secretary shall monitor and review compliance with the provisions of this part in accordance with the provisions of the General Education Provisions Act [20 U.S.C.A. § 1221 et seq.]. In reviewing the State plans submitted by the State educational agencies under section 11432(e) of this title, the Secretary shall evaluate whether State laws, policies, and practices described in such plans adequately address the problems of homeless children and homeless youth relating to access to education and placement as described in such plans.

(2)(A) The Secretary, in consultation with persons and organizations that are knowledgeable about the needs of

homeless children and youth, shall, through the awarding of a grant, or through entering into a contract or cooperative agreement, conduct a study to determine the best means of identifying, locating, and counting homeless children and youth for the purposes of this part. Such persons and organizations to be consulted shall include representatives of State coordinators, local educational agencies with substantial numbers of homeless children and youth, local government agencies with responsibility for administering homeless shelters, and advocacy groups representing the interests of homeless children and youth. The Secretary shall also consult with the Secretary of Health and Human Services and the Secretary of Housing and Urban Development, as appropriate, in carrying out this paragraph.

(B) The study conducted under subparagraph (A) shall consider—

(i) the appropriate definition of the terms "homeless child" and "homeless youth";

(ii) the experience of the 1990 Census in identifying, locating, and counting homeless children and youth;

(iii) appropriate methodolgies for identifying, locating, and counting such children and youth, including using schools, shelters, and other social service agencies to collect data; and

(iv) the projected accuracy of the methodologies identified in clause (iii), and the costs associated with the use of each methodology;

to determine the number of homeless children and youth in the United States to create as accurate an account as possible of the number, location, and living circumstances of such children and youth, including the number of such children and youth that are attending school regularly, part-time, or not at all, and reasons for the nonattendance of such children and youth.

(C)(i) Not later than 240 days after November 29, 1990, the Secretary shall prepare and submit, to the appropriate committees of Congress, a report containing the results of the study conducted under subparagraph (A) and the estimated costs of making the estimates required under clause (ii).

(ii) Not later than December 1, 1992, the Secretary, in consultation with the appropriate committees of Congress, and through the use of appropriate statistical methodology, shall, through a grant, contract or cooperative agreement, determine accurate estimates of the number of homeless children and youth throughout the Nation and the number of such children and youth attending school.

(D) The Secretary may reserve not more than $250,000 from amounts appropriated under section 11432(g) of this title in 1991 to carry out the study required under subparagraph (A).

(E) There are authorized to be appropriated such sums as may be necessary in 1992 to perpare the report and estimates required under subparagraph (C).

(3) The Secretary shall provide such support and technical assistance to the State educational agencies as is required by such agencies to carry out their responsibilities under this part.

(4) The Secretary shall prepare and submit a report to the Congress on the programs and activities authorized by this part at the end of each fiscal year.

(5) The Secretary shall compile and submit a report to the Congress containing the information received from the States pursuant to section 11432(d)(3) of this title within 45 days of its receipt.

(5)[1] The Secretary shall conduct evaluation and dissemination activities of programs designed to meet the educational needs of homeless elementary and secondary school students.

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[1] So in orginal.

(6) The Secretary shall require applications for grants under this part to be submitted to the Secretary not later than the expiration of the 60-day period beginning on the date that funds are available for purposes of making such grants and shall make such grants not later than the expiration of the 120-day period beginning on such date.

(7) The Secretary, based on the infomation received from the States and information gathered by the Secretary under paragraph (1), shall determine the extent to which State educational agencies are ensuring that each homeless child and homeless youth has access to a free ap[illegible]opriate public education as described in section 11431(1) of this title.

(Pub.L. 100-77, Title VII, § 724, July 22, 1987, 101 Stat. 528; Pub.L. 101-645, Title VI, § 612(d), Nov. 29, 1990, 104 Stat. 4742.)

§ 11435. Definitions

As used in this part—

(1) the term "Secretary" means the Secretary of Education; and

(2) the term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(Pub.L. 100-77, Title VII, § 726, formerly § 725, July 22, 1987, 101 Stat. 528; Pub.L. 101-628, Title VII, § 702(c), Nov. 7, 1988, 102 Stat. 3245; renumbered § 726 Pub.L. 101-645, Title VI, § 613(1), Nov. 29, 1990, 104 Stat. 4743.)